

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DRAFT 6/15/15 – For Internal Deliberation Only

301 CMR 25.00: DESIGNATION OF PORT AREAS

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25.01: Authority and Purpose

(1) Authority. Pursuant to the authority of M.G.L. c. 21A, §§ 2 and 4A, 301 CMR 25.00 is adopted by the Secretary as a means of fulfilling the statutory responsibility of the Executive Office of Energy and Environmental Affairs to serve as the primary agency of the Commonwealth for environmental planning, as set forth in M.G.L. c. 21A, §§ 2 and 4; and to implement the Massachusetts Coastal Zone Management Program (CZM Program), established by M.G.L. c. 21A, § 4A for the purpose of securing for the inhabitants of the Commonwealth the objectives and benefits of the Federal Coastal Zone Management Act, 16 USC 1451 *et seq.* 301 CMR 25.00 forms part of the CZM Program and shall be interpreted and applied in a manner consistent therewith.

(2) Purpose. 301 CMR 25.00 sets forth a procedure for establishing and modifying the boundaries of Designated Port Areas (DPAs). Since 1978, the CZM Program has identified DPAs as geographic areas of particular state, regional, and national significance with respect to the promotion of commercial fishing, shipping, and other vessel-related activities associated with water-borne commerce and the promotion of manufacturing, processing, and production activities reliant upon marine transportation or the withdrawal or discharge of large volumes of water. These water-dependent industrial uses vary in scale and intensity but generally share a need for infrastructure with three essential components: a waterway and associated waterfront that has been developed for some form of commercial navigation or other direct utilization of the water, backland space that is conducive in both physical configuration and use character to the siting of industrial facilities and operations, and land-based transportation and public utility services appropriate for general industrial purposes.

This special combination of industrial attributes is found in a very limited and diminishing portion of the coastal zone, and particularly few areas are of sufficient contiguous extent to invite concentrations of related businesses and/or large-scale facilities. Because economic, environmental, and social factors now virtually preclude further development of such an intensive nature, what remains of the industrialized coast should be preserved to the maximum extent practicable in order to meet the long-term, cumulative space needs of the water-dependent industries that these areas are so well-suited to accommodate. As a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, non-industrial or nonwater-dependent types of development, which enjoy a far greater range of locational options.

Accordingly, within DPAs it is the intent of the CZM Program to encourage water-dependent industrial use and to prohibit on tidelands subject to the jurisdiction of M.G.L. c. 91 other uses except for compatible public access and certain industrial, commercial, and transportation activities that can occur on an interim basis without significant detriment to the capacity of DPAs to accommodate water-dependent industrial use in the future.

The additional purposes served by 301 CMR 25.00 are as follows:

- (a) to carry out overall state growth policy by encouraging further maritime build-out of existing industrialized waterfronts, in order to both minimize incremental detriments to the environment and maximize the effective return on prior expenditures for port infrastructure;
- (b) to carry out overall state environmental policy by, among other things, providing for the management of land and water resources to assure the protection and balanced utilization of such resources; promoting the best usage of land and water by encouraging and providing for, in cooperation with other appropriate state agencies, planned industrial, commercial, and community

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development; and assisting other state and regional agencies in developing programs and policies relating to land use planning and regulation in the Commonwealth; and
(c) to comply with and implement national coastal policy as set forth in the Federal Coastal Zone Management Act of 1972, as amended, by giving priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, ports and transportation, and to the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists.

25.02: Definitions

Coastal zone means that area subject to the CZM Program and defined in 301 CMR 20.03 and 20.99.

CZM means the Massachusetts Office of Coastal Zone Management.

CZM Program means the Massachusetts Coastal Zone Management Program established pursuant to M.G.L. c. 21A and codified in 301 CMR 20.00, and as may be amended hereafter.

DEP means the Department of Environmental Protection.

Design depth means the required project depth, as measured at mean low water, specified in the applicable authorizing documents for a navigation project carried out by a public agency responsible for channel construction. In the event multiple construction projects have been carried out in a channel, the design depth shall be the deepest of the required depths specified for the respective projects.

Director means the Director of CZM as provided in M.G.L. c. 21A, § 4A, as amended in St. 1983, c. 589.

Designated Port Area (DPA) means an area of contiguous lands and waters in the coastal zone that has been so designated in accordance with 301 CMR 25.00. Until such time as any further designation decisions are made pursuant thereto, the DPA boundaries shall be as indicated on the Appendix A maps of the original Waterways Regulations of DEP, effective September 15, 1978, and as said maps have been amended prior to December 15, 1994. Official copies of the original maps and of any superseding maps indicating the most current DPA boundaries are available from CZM.

Environmental Monitor means the publication published by the Secretary and further described in 301 CMR 11.19.

EEA means the Executive Office of Energy and Environmental Affairs.

Person means any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, or public or quasi-public agency or authority.

Planning representative means the person(s) designated by the municipal official to represent the municipality in all proceedings under 301 CMR 25.00.

Public agency means any agency, department, board, district, commission, or authority of the Commonwealth or the United States, or of any municipality or other political subdivision of the Commonwealth.

Massport means the Massachusetts Port Authority, a body politic incorporate established and operating pursuant to St. 1956, c. 465, as amended. For purposes of 301 CMR 25.00, Massport shall be considered a state agency.

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Municipal official means the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government.

Requesting party means any person eligible to request the initiation of a DPA review, as listed in 301 CMR 25.03(1).

Secretary means the Secretary of the Executive Office of Energy and Environmental Affairs.

State agency means a public agency of the Commonwealth.

Tidelands means present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands as defined in 310 CMR 9.02.

Water-dependent industrial use means any use found to be such in accordance with 310 CMR 9.12(2)(b).

Waterways means any area of water and associated submerged land or tidal flat lying below the high water mark of any navigable river or stream, any Great Pond, or any portion of the Atlantic Ocean within the Commonwealth, which is subject to the Waterways Regulations at 310 CMR 9.04.

Waterways Regulations means the regulations established by DEP under M.G.L. c. 91, at 310 CMR 9.00 and as may be amended hereafter.

25.03: Designation Procedures

(1) Initiation of Review. CZM shall periodically carry out reviews under these regulations to determine whether particular areas of land or water shall be included or remain in an existing DPA, or form a new DPA. Within 60 days of the effective date, an initial series of reviews shall be commenced to determine whether the boundaries of existing DPAs should be modified. Except as provided in 301 CMR 25.03(2), the initial review of an existing DPA shall cover all areas for which the planning representative of the municipality provides CZM with an assessors map and mailing addresses for all persons owning property within such areas, as shown on the most recent applicable tax list of the assessors. Further, in the event a municipality submits a complete request for Scope of a DPA Master Plan in accordance with 301 CMR 23.03, the initial review of the DPA in question shall commence within 30 days after submission of such complete request.

Except as provided in 301 CMR 25.03(2), at any time after December 15, 1996, the Director also may carry out a review upon the written request of:

- (a) the municipal official or planning board, or the City Council or other municipal body with authority to enact zoning, of the municipality where the area proposed for review is located;
- (b) any port authority or other state or regional agency with planning, regulatory, or development authority over the area proposed for review;
- (c) the owner(s) of the area proposed for review; or
- (d) any ten citizens of the Commonwealth.

Such written request shall be accompanied by an assessors map and mailing addresses for all persons owning property within the area proposed for review, as shown on the most recent applicable tax list of the assessors, as well as by preliminary documentation prepared in accordance with any content and format instructions provided by CZM, with whom advance consultation is encouraged in order to obtain guidance as to the minimum information submittal necessary for the request to be completed. Within 45 days of receiving a completed request, the Director shall determine in writing whether the request for review has been accepted or declined and shall summarize the reasons for the determination. In the event a request for review is accepted, the Director may require that additional information be provided by the requesting party, in accordance with any written guidelines that may be provided by CZM.

(2) Areas Not Eligible for Review. The following areas shall not be included in any review carried out under 301 CMR 25.00:

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- (a) any area that has been the subject of a designation decision under 301 CMR 25.03(5) within the previous five years, except upon a demonstration by a requesting party that substantial and rapid change has occurred in circumstances affecting the suitability of the area to accommodate water-dependent industrial use, as governed by the designation standards set forth in 301 CMR 25.04;
 - (b) any area within a DPA that consisted primarily of water-dependent industrial use throughout the previous five years;
 - (c) any area within a DPA that is recommended for exclusion from review by the City Council or other municipal body with authority to enact zoning, unless the area is the site of a proposed project that is exempt by law from compliance with zoning or has been granted relief from the use restrictions applicable under zoning; or
 - (d) any land area within a DPA that is entirely bounded by existing DPA lands and/or DPA waters, exclusive of existing roads, residential properties, and sensitive wetland resource areas, such as salt marsh, dunes, banks, beaches, etc.
- (3) Commentary. As a general rule, CZM intends to apply the foregoing eligibility criteria in the context of groups of parcels that form coherent planning units, rather than to individual project sites or other properties under common ownership or control. DPA-related attributes typically vary across different parcels, such that the combined characteristics of associated parcels in the same general vicinity are not reflected accurately in the characteristics of any single property. For this reason, it is important that geographic areas subject to review be sized and configured in a manner that allows consideration of all relevant factors affecting overall eligibility to accommodate water-dependent industrial use.
- (4) Information Gathering Process. CZM shall carry out all DPA reviews in accordance with the following provisions:
- (a) Notice of the review shall be published in the *Environmental Monitor* and, on or before the date of such publication, in a local newspaper of general circulation. A copy of the notice shall be sent to all public agencies and other persons identified in 301 CMR 25.06(5) and to all property owners identified on any list provided in accordance with 301 CMR 25.03(1).
 - (b) For a period of 30 days after publication of the notice in the *Environmental Monitor*, CZM shall accept public comments relative to areas and issues that might be addressed in the review. Within this comment period, a public information meeting shall be convened in the municipality where the area subject to review is located. CZM may extend the public comment period upon the request of any interested person and shall publish notice of any extension in the next available edition of the *Environmental Monitor*.
 - (c) Upon the close of the public comment period, CZM shall arrange a consultation session involving one or more meetings with the planning representative of any affected municipality and with DEP. As appropriate the Director shall also consult with Massport, the operators of water-dependent industrial facilities in the DPA, and any other public agencies or persons with expertise related to the designation standards of 301 CMR 25.04.

The purpose of the consultation session is to obtain further input and assistance in conducting the review. A work plan shall be established that identifies, among other things, the scope of any additional information that needs to be compiled together with an appropriate division of information-gathering responsibility. The participating agencies shall adopt a target schedule for the information-gathering process, which shall not exceed six months except as the participating agencies may otherwise agree. If the accuracy or appropriateness of any factual information gathered during the consultation session is disputed by the planning representative of an affected municipality, or by any participating agency, the Director shall seek to resolve the dispute through appropriate mediation measures.
 - (d) Within 30 days after the close of the consultation session, CZM shall issue a written designation report for public review and comment. The report shall indicate which areas CZM proposes to include and/or exclude from a DPA and shall include a map(s) showing all proposed changes to existing boundaries and/or specifications of new boundaries. The report shall set forth the data and analysis on which the proposed map amendments are based, in accordance with the designation standards set forth in 301 CMR 25.04.

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(5) Public Comment on Designation Report. CZM shall solicit public response to the designation report in accordance with the following provisions:

- (a) A notice of availability of the report and of the location and date of the public hearing scheduled in accordance with 301 CMR 25.04(4)(c) shall be published in the next available edition of the *Environmental Monitor* and, on or before the date of such publication, in a local newspaper of general circulation. A copy of the notice shall be sent to the relevant planning representative(s) and to all public agencies and other persons identified in 301 CMR 25.06(5).
- (b) For a period of 30 days after publication of the notice in the *Environmental Monitor*, CZM shall accept public comments on the designation report. CZM may extend the public comment period upon the request of any interested person, and shall publish notice of any extension in the next available edition of the *Environmental Monitor*.
- (c) A public hearing shall be held by CZM prior to the close of the public comment period and within the municipality where the area subject to review is located.

(6) Issuance of Designation Decision and Map Amendment. Within 60 days after the close of the public comment period, the Director shall issue a final written designation decision stating whether the area(s) under review shall be included within a DPA, in accordance with the designation standards set forth at 301 CMR 25.04. The decision shall include an amended map(s) showing the modified or new boundaries of the DPA, and shall state the reasons for any boundary changes relative to the map previously proposed in the designation report. The Director may qualify, limit, or otherwise condition the designation decision in any manner that serves the purposes of these regulations, and the decision shall take effect immediately upon the date of issuance. A copy of the decision shall be sent to the relevant planning representative(s), to all public agency representatives with whom consultation occurred, and to any other person on request. Notice of the decision shall be published in the next available edition of the *Environmental Monitor* and a copy of the notice shall be sent to all public agencies and other persons identified in 301 CMR 25.06(5).

25.04: Designation Standards

(1) Designation of Waters. An area of water reviewed under 301 CMR 25.00 shall be included or remain in a DPA if and only if CZM finds that the area is in substantial conformance with the following criteria governing suitability to accommodate water-dependent industrial use, as appropriate to the harbor in question:

- (a) the water area must include, or be contiguous with, other DPA waters that include:
 - 1. a navigable entrance or main channel with a design depth of at least 20 feet; and
 - 2. a shoreline that has been substantially developed with piers, wharves, bulkheads, or other structures that establish a functional connection with a land area meeting the criteria set forth in 301 CMR 25.04(2); and
- (b) the water area must be of a configuration, size, and location appropriate for the maneuvering or berthing of vessels, the placement of intake/outfall structures, or other activities involving direct utilization of the water; at a minimum, the Designated Port Area shall include:
 - 1. all channels (including sloped sides necessary to create actual depth) and mooring and turnaround areas within or serving as access channels to land or water areas meeting the designation standards of 301 CMR 25.04; and
 - 2. any water area lying between an entrance or main channel and any land or water areas meeting the designation standards of 301 CMR 25.04, extending channelward from such areas.

(2) Designation of Lands. An area of land reviewed under 301 CMR 25.00 shall be included or remain in a DPA if and only if CZM finds that the area is in substantial conformance with the following criteria governing suitability to accommodate water-dependent industrial use, as appropriate to the harbor in question:

- (a) the land area must include, or be contiguous with other DPA lands that include, a shoreline that has been substantially developed with piers, wharves, bulkheads, or other structures that establish a functional connection with a water area meeting the criteria set forth in 301 CMR 25.04(1);
- (b) the land area must lie in reasonable proximity to:
 - 1. established road or rail links leading to major trunk or arterial routes; and
 - 2. water and sewer facilities capable of supporting general industrial use;

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- (c) the land area must exhibit a topography that is generally conducive to industrial use, or reasonably capable of becoming so in terms of technology, cost, and other appropriate factors governing engineering feasibility; and
- (d) the land area must exhibit a use character that is predominately industrial or reasonably capable of becoming so because it does not contain a dense concentration of:
 - 1. non-industrial buildings that cannot be removed or converted, with relative ease, to industrial use; or
 - 2. residential, commercial, recreational, or other uses that unavoidably would be destabilized if commingled with industrial activity.

(3) Commentary. As a general rule, CZM intends to apply the foregoing suitability criteria in the context of groups of parcels that form coherent planning units, rather than to individual project sites or other properties under common ownership or control. DPA-related attributes typically vary across different parcels, such that the combined characteristics of associated parcels in the same general vicinity are not reflected accurately in the characteristics of any single property. For this reason, it is important that geographic areas subject to review be sized and configured in a manner that allows consideration of all relevant factors affecting overall suitability to accommodate water-dependent industrial use.

25.05: DPA Boundary Maps

- (1) Maps. Maps showing DPA boundaries currently in effect are available from CZM.
- (2) Boundary Delineation. Except as otherwise deemed appropriate by the Director, DPA boundaries shall coincide to the maximum extent practicable with roadways, property lines, or other physical or legal landmarks that are generally permanent and can be ascertained with relative ease through field observation or inspection of scaled maps available from municipalities or other government sources. Notwithstanding any other provision of 301 CMR 25.00, CZM may make minor adjustments of an existing DPA boundary to facilitate its identification in relation to such physical or legal landmarks, provided however that such adjustments generally should not result in a net reduction in the total area of the DPA. Unless otherwise specified in a designation decision issued pursuant to 301CMR 25.00, any public or private way serving as the boundary of a DPA shall be included in its entirety.
- (3) Boundary Determinations. It is the exclusive responsibility of CZM to formally interpret the DPA boundary maps to determine whether any specific parcel or portion thereof is included in a DPA. Any person who desires a boundary determination shall submit a written request to CZM and shall provide copies of the request to DEP and to such other persons as CZM may require.

25.06: Miscellaneous

- (1) Effects of Designation on EEA Agency Actions. Inclusion of lands and waters in a Designated Port Area shall have the following effects:
 - (a) in accordance with 301 CMR 21.00, CZM review of federal activities within or impacting a Designated Port Area shall ensure that such activities are consistent with the purposes of 301 CMR 25.00, which implement an enforceable policy of the approved CZM Program;
 - (b) in accordance with 301 CMR 20.00, all appropriate EEA agencies shall enforce their laws, process regulatory reviews, conduct program activities, disburse funds, construct or supervise the construction of works, or otherwise administer their programs as they relate to DPAs so as to advance the purposes of 301 CMR 25.00.
- (2) Applicability of Designation. A decision under 301 CMR 25.00 to include a new area of land or water in a DPA shall not apply to a project within such area if, prior to the date the notice of commencement of review was published in the *Environmental Monitor*:
 - (a) the public comment period on a license or permit application under M.G.L. c. 91 had commenced, in accordance with the notice requirements of 310 CMR 9.13(1); and

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- (b) applications were submitted and accepted for all other state and federal approvals required for the project, including but not limited to any federal consistency certification to be obtained from CZM.
- (3) Clarification of Designation. Upon the request of any interested person, CZM may issue written clarification of a designation decision or minor map corrections, as necessary to serve the purposes of 301 CMR 25.00.
- (4) Saturday, Sunday, or Legal Holiday. When the last day for an action under 301 CMR 25.00 falls on a Saturday, Sunday, or legal holiday, the action shall occur on the next business day. When the last day of the receipt of comments or receipt of documents for publication in the *Environmental Monitor* falls on a Saturday, Sunday, or legal holiday, CZM shall accept comments or documents on the next succeeding business day.
- (5) Distribution of Notice. All public notices prepared in accordance with 301 CMR 25.03 shall be sent, on or before the date the notice is published in the *Environmental Monitor*, to the following:
- (a) the municipal official, the planning board, the conservation commission, the City Council or other municipal body with authority to enact zoning, and the harbormaster, if any, of the municipality where the area subject to review is located;
 - (b) any party requesting a review under 301 CMR 25.03(1);
 - (c) DEP, Division of Wetlands and Waterways and Regional Environmental Engineer;
 - (d) Department of Conservation and Recreation, Division of Waterways;
 - (e) Massachusetts Port Authority, Maritime Division and Planning and Development Division, as applicable;
 - (f) Department of Transportation;
 - (g) Executive Office of Housing and Economic Development;
 - (h) Executive Office of Economic Affairs;
 - (i) Regional planning agencies or land use commissions, as applicable;
 - (j) U.S. Army Corps of Engineers, New England Division;
 - (k) any person who had previously submitted written comments in the proceeding or had requested, in writing, notification and provided the address to which notice should be sent; and
 - (l) any other person deemed appropriate by CZM.
- (6) Severability. If any provision of 301 CMR 25.00 or the application thereof is held to be invalid, the holding shall not affect the validity of any other provision of 301 CMR 25.00.

REGULATORY AUTHORITY

301 CMR 25.00: M.G.L. c. 21A, §§ 2 and 4A.